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IN THE

Supreme Court of the United States

NORTHWEST LOUISIANA FISH & GAME PRESERVE COMMISSION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

APPEAL FROM THE UNITED STATES COURT OF FEDERAL CLAIMS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. How can the federal navigational servitude legally apply above the normal or ordinary high water mark of the Red River, or extend to the Northwest Louisiana Fish and Game Preserve through a tributary that is not used for trade or commerce and a dam built by the State of Louisiana in 1931?

2. How can the courts justify granting a privilege without material basis to the public purpose of navigation while denying special protection to any other public uses, when just compensation for the taking of private property is a due process right guaranteed by the Fifth Amendment of the United States Constitution?

CORPORATE DISCLOSURE STATEMENT

The Northwest Louisiana Fish & Game Preserve Commission (the "Preserve Commission") is the Louisiana state agency in possession of the Northwest Louisiana Fish and Game Preserve made up of Black Lake, Saline Lake, and Clear Lake in the Parish of Natchitoches, Louisiana. The Preserve Commission is the state entity responsible for the fish and game preserve situated in rural northwestern Louisiana made up of several lakes and contiguous land commonly referred to as Black Lake Complex.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF APPENDICES	v
TABLE OF CITED AUTHORITIES	vi
OPINION BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	10
I. REVIEW IS WARRANTED TO ADDRESS THE MISAPPLICATION OF THE NAVIGATIONAL SERVITUDE TO THE FACTS OF THIS CASE	13
A. The Navigational Servitude Does not Extend to the Northwest Louisiana Fish and Game Preserve	13

Contents

Page

II. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT IN TREATMENT BETWEEN NAVIGATION AND OTHER PUBLIC USES, THE TAKING OF WHICH ARE COMPENSABLE UNDER THE UNITED STATES CONSTITUTION .. 23

CONCLUSION 30

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Federal Circuit Decided July 31, 2009 ..... 1a

Appendix B — Opinion Of The United States Court Of Federal Claims Filed October 31, 2007 ..... 16a

TABLE OF CITED AUTHORITIES

Page

Cases:

Alameda Gateway, Ltd. v. U.S., 45 Fed.Cl. 757 (Fed.Cl.,1999) 13

Banks v. U.S., 2003 WL 18410 (C.A.Fed. 2003) ... 10, 11

Banks v. U.S., 71 Fed.Cl. 501 (Fed.Cl.,2006) 26

Boling v. U.S., 220 F.3d 1365 (C.A.Fed. 2000) .. 11

Boone v. U.S., 944 F.2d 1489 (C.A.9.Haw.,1991) 13, 14

Dardar v. Lafourche Realty Co., Inc., 985 F.2d 824 (C.A.5,1993) 27

Farmland Preservation Ass'n v. Goldschmidt, 611 F.2d 233 (C.A.8,1979) 27

Federal Real Estate & Storage Co. v. U.S., 79 Ct.Cl. 667 (Ct.Cl.,1933) 27

First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114 (C.A.10,2002) 25

Fruin-Colnon Corp. v. Vogt, 500 F.Supp. 606 (S.D.Ill.,1980) 27

Cited Authorities

Page

Goose Creek Hunting Club, Inc. v. United States, 518 F.2d 579, 582, 207 Ct.Cl. 323 (1975) 17, 18

Kaiser Aetna v. U. S., 444 U.S. 164 (1979) 11, 12, 13, 21

Kingsport Horizontal Property Regime v. U.S., 46 Fed.Cl. (Fed.Cl.,2000) 16

Lingle v. Chevron U.S.A. Inc., 125 S.Ct. 2074, 544 U.S. 528, 161 L.Ed.2d 876 (2005) 24

Lykes Bros., Inc., v. U.S. Army Corps of Engineers, 821 F.Supp. 1457 (M.D.Fla. 1993) 17

Maritrans Inc. v. U.S.; 342 F.3d 1344 (C.A.Fed.2003) 25

Northwest Louisiana Fish & Game Preserve Commission v. U.S., 574 F.3d 1386 (C.A.Fed.,2009), 62 Fed.Cl. 760, 446 F.3d 1285, 79 Fed.Cl. 400 1

Owen v. U.S., 851 F.2d 1404 (C.A.Fed.,1988) 10, 11, 14, 15

Palm Beach Isles Assoc. v. U.S., 2003 WL 22937326 Fed.Cl.,2003 13

Cited Authorities

Page

Parm v. Shumate, 513 F.3d 135 (C.A.5.La.,2007) 26

Ridge Line, Inc. v. U.S., 346 F.3d 1346 (C.A.Fed.,2003) 25

Sarpy County, Neb. v. U. S., 386 F.2d 453, 181 Ct.Cl. 666 (Ct.Cl.1967) 29

State of Illinois v. U.S., 15 Cl.Ct. 399 (1988) ... 21

State of Wash. v. U.S., 214 F.2d 33 (C.A.9, 1954) 29

Tri-State Materials Corp. v. U.S., 550 F.2d 1 (Cl.Ct. 1977) 11, 14

U.S. v. 30.54 Acres of Land, More or Less, Situated in Greene County, Com. of Pa., 90 F.3d 790 (C.A.3,1996) 25

U.S. v. Ballinger, 395 F.3d 1218 (C.A.11.Ga.,2005) 26

U.S. v. Certain Parcels of Land in Kent County, Mich., 252 F.Supp. 319 (D.C.Mich. 1966) 28

U.S. v. Cress, 243 U.S. 316 (U.S. 1917) 17

U.S. v. Fuller, 93 S.Ct. 801, 409 U.S. 488, 35 L.Ed.2d 16 (1973) 24

Cited Authorities

Page

U.S. v. Gossler, 60 F.Supp. 971 (D.C.Or.1945) ... 27

United States v. General Motors Corp., 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945) 21, 28

United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950) 11, 16

U.S. v. Shahani-Jahromi, 286 F.Supp.2d 723 (E.D.Va.,2003) 26

U.S. v. Virginia Elec. & Power Co., 81 S.Ct. 784 (U.S.Va.,1961) 13

U. S. ex rel. Tenn. Valley Authority v. Welch, 66 S.Ct. 715, 327 U.S. 546, 90 L.Ed. 843 (1946) 25

U.S. v. Willow River Power Co., 324 U.S. 499(U.S. 1945) 19, 20, 21

Village of Norwood v. Baker, 19 S.Ct. 187, 172 U.S. 269, 43 L.Ed. 443 (1898) 24

United States Constitution:

U.S.C.A. Const.Amend. 5 .....i, 1, 23, 24

U.S.C.A. Const. Art. I § 8, cl. 2, 26

Cited Authorities

Page

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C.A. § 2501 9

Other Authorities:

LA Op.Atty.Gen., No. 92-472 (Oct. 22, 1992) 2

La. R.S. 9:1101 2

OPINION BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at *Northwest Louisiana Fish & Game Preserve Commission v. U.S.*, 574 F.3d 1386 (C.A.Fed.,2009). The government originally moved for judgment on the pleadings, which was granted by the United States Court of Federal Claims, Nancy B. Firestone, 62 Fed.Cl. 760. Following reversal of the judgment and remand, 446 F.3d 1285, the government again moved for judgment on pleadings. The United States Court of Federal Claims, 79 Fed.Cl. 400, granted the government's motion. On appeal, the Federal Circuit, Rader, Circuit Judge, held that the property interests of petitioner, the Preserve Commission, in the lake and contiguous lands were subservient to the navigational servitude and affirmed, *Northwest Louisiana Fish & Game Preserve Commission v. U.S.*, 574 F.3d 1386 (C.A.Fed.,2009). Judge Rader also filed an Additional View.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S.C.A. Const.Amend. 5.

"No person shall be...deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S.C.A. Const. Art. I § 8, cl. 3.

Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

STATEMENT OF THE CASE

The fish and game preserve at issue was created on 1926 as a wildlife and fisheries habitat and recreational area for the citizens of the State. The purpose of the preserve is to provide Louisiana residents and visitors with use and enjoyment. The Preserve Commission functions as the entity to effectuate and protect those objectives.

Black Lake Complex, is connected to Red River by a tributary called Saline Bayou, through which flood waters were historically released and the lake was periodically drawn down in order to facilitate maintenance of the preserve. At one end of the tributary is Allen Dam, which was constructed by the State of Louisiana shortly after the creation of the fish and game preserve.

Title to the land around and under the lake, as well as the lake itself, is held by the State of Louisiana. The State owns and has owned lakes and lake beds to the exclusion of others by virtue of its inherent sovereignty since 1812, the date of admission to the union, and then by enactment of specific legislation in 1910. Op.Atty.Gen., No. 92-472 (Oct. 22, 1992); La. R.S. 9:1101.

The Preserve Commission is a state created agency, or "political subdivision," that is charged with all regulation, enforcement, and adjudication pertaining to Black Lake Complex. The Preserve Commission has the explicit right, power, and authority to sue and be sued as a subdivision of the State.

Further, petitioner also makes rules and regulations to administer the preserve, regulates and controls the taking of fish and game from the preserve, establishes closed seasons, fixes fish and game limits, employs wardens, builds roads, provides camps and boats, fixes fees for hunting and fishing, as well as State licenses, regulates the building and location of duck blinds, issues licenses and permits, enforces prohibitions contained in its rules and regulations, leases to commercial fishing organizations, employs all necessary labor, establishes fish hatcheries, and does all things necessary to conserve and propagate fish and game in the preserve. The Preserve Commission has the explicit power and authority to "buy, lease, or sell properties necessary to the establishment and maintenance or improvement of the said Preserve." In short, the Preserve Commission has the property rights generally associated with ownership.

Respondent, through the United States Corps of Engineers ("Corps"), erected five locks and dams along Red River to increase its depth and facilitate navigation. Between Lock No. 3 and Lock No. 4 is the navigation pool in question, Pool 3, to which Black/Clear Lake is connected by the tributary. Pool 3 was originally designed to have a water level of 87 MSL, the maximum

level determined by the Corps' New Orleans District to avoid ground water damage and associated claims for damages.

However, the level of Pool 3 was eventually raised to 95 MSL. Although property and property rights along the river were acquired by or on behalf of the Corps, no rights were acquired related to petitioner's interest in the area. Damage to Black Lake Complex caused by the artificially maintained level of the river occurred after the event of complete impoundment of Pool 3.

In July of 1995, the Corps' Vicksburg District Project Review Board reviewed and endorsed the Final Project Management Plan, which outlined "remaining project requirements" as of January 1995. The Plan contained the following provision:

> (7) aa. *Pool 3 Lakes*
>
> Three State-owned lakes adjacent to Pool 3, Nantachie, Clear-Black, and Saline, will be impacted to varying degrees by the impoundment of the 95 foot navigation pool above Lock and Dam No. 3. The most significant impact to the lakes is associated with the ability to draw the lakes down by gravity flow for aquatic weed control and fisheries management. However, other aspects such as structural stability of the lake dams and project induced flooding have also been investigated.

> Subsequently, additional detailed design has been initiated and this design effort and construction have been added to the project scope, cost, and schedule. Also, added as a remaining requirement was a five year lake monitoring study which was part of the recommended plan in the approved DM 44E. This study monitors water quality and fisheries to determine the effects of operation of the navigation pool. The study has been initiated and is scheduled to be completed in 1998.

After 1995, the loss and damages which eventually gave rise to this litigation as a result of the raising of the level of Pool 3 to 95 MSL gradually began to occur. In late 1996, the Preserve Commission requested the Red River Water Way Commission to obtain assistance from the Corps in a proposed draw down of Black/Clear Lake based on concrete data that the lake complex was having an adverse impact from the project.

The Corps refused to cooperate, despite having maintained in the past that such data would be heeded and despite provisions of its own Project Management Plan. The Corps denied the Preserve Commission's request because navigation would allegedly be impeded by a draw down.

By early 1997, petitioner began encountering a severe hydrilla infestation of Black Lake Complex, making some parts of the preserve all but useless for recreational purposes. Now, more than ten years later, the condemnation of Black Lake Complex has only increased with more infestation.

Historically, the petitioner had been able to control fish populations and aquatic vegetation by drawing down the lake complex through the tributary that connects the lakes to Red River. However, petitioner was unable to draw down the lake for the first time 1997, because the United States Corps of Engineers ("Corps") had recently completed a project to raise the Mean Sea Level (MSL) of the Red River eight feet through a series of locks and dams that created navigational pools. Raising the level of the Red River had a domino effect that eventually resulted in the permanent taking of the lake complex. What resulted was a gradual deterioration of the preserve, as follows: impoundment of the navigational pool was the governmental act, severe hydrilla infestation was the direct but delayed result, and gradual loss of use of the property was the damage suffered by petitioner.

The nature of the consequential damage of the increased pool level is best described by the Corps in a letter dated December 20, 1999, addressed to the Executive Director of the Red River Waterway Commission in which the Corps acknowledges that they received complaints in 1996 from landowners concerned about the effects of the project to improve navigation of Red River. The Chief of the Corps Real Estate Division stated, "We initially attributed this to the fact that the pool had recently been impounded (Feb 1995) and the extended high water mark that occurred during mid 1995 and early 1996. We then entered a drier period with no complaints from landowners in Pool 5 concerning project impacts." The Chief went on to explain that it was not until early 1998 that they again started receiving information that the new pool level was adversely

affecting land in the vicinity of the pool, which motivated the Corps to start an investigation into the post project impacts. The Corps concluded that lands above the ordinary high water elevation were being impacted for which owners were not compensated. The letter referenced maps depicting "new inundated areas" and suggested that "there is a possibility that additional affected areas could be identified in the future." Identical problems and complaints were associated with Pool 3.

The loss of the ability to draw down the lake through the tributary to the level of the ordinary high water mark of the Red was not the only problem for petitioner caused by the actions of the government. The elevation of the navigational pool significantly increased the tailwater condition of the tributary and Black Lake Complex, thereby reducing flood control of the lake. The higher tailwater in the lakes' tributary caused by a higher mean sea level of Pool 3 disabled the discharge capacity of Black/Clear Lake through the spillway.

The increased level of the water table around Pool 3 is evidenced by the geological investigation of the vicinity performed by Geotechnical Testing Laboratory in October of 1996 at the request of the Red River Waterway Commission. The report generated by the investigation of the troublesome ground water and subsurface conditions demonstrated a relatively high water condition around Pool 3 attributable to the

level of the navigational pool of Red River. The investigators found that

> "the subsurface water regime is subject to change with variations in climatic conditions and possibly flow levels within adjacent waterway. It is not possible to predict future groundwater fluctuations based upon single, short-term observations. Long-term monitoring of groundwater conditions with respect to river flow levels and precipitation rates will be required to evaluate correlations between the various influences."

The problem with an increased water table was and is compounded by the lost ability to draw down the lake through Allen Dam and the lakes' tributary. Additionally, petitioner has experienced a drastic increase of land flooding from the Lake as a result of the raising of the water level of Pool 3. But most importantly, the continuous high water level of Black/Clear Lake has resulted in an ongoing and increasingly severe problem with aquatic growth, namely hydrilla and coontail, which has rendered the northern part of the lake virtually useless. A large portion of the lake is not even accessible by boat. Managing fish populations has been severely impaired, and the situation continues to deteriorate exponentially. The last scheduled draw down of Black Lake occurred in the Fall of 1994, before the completion of the project to raise the elevation of navigational pool to 95 MSL. That draw down was successful in keeping the Black Lake Complex functional, but that was more than fourteen years ago.

On January 8, 1997, the Preserve Commission called a special meeting and passed a resolution to permit pursuing litigation against the Red River Waterway Commission and the Corps. The meeting was precipitated by the aforementioned denial of the Preserve Commission's written request for the Corps to assist in a proposed draw down of Black/Clear Lake. As previously stated, the Corps denied responsibility for the Preserve Commission's loss, the Corps rejected the Preserve Commission's request based on the contention that navigation would be impeded by a draw down.

For the last decade, the Preserve Commission has consistently pursued compensation from the federal government for the loss of use of land and water, and the taking and destruction of petitioner's property, as a result of the raising of the water level of Pool 3 from 87 MSL to 95 MSL and the artificial maintenance of the river at the higher level. Previously, petitioner alleged damages in the estimated amount of 26 million dollars based on an appraisal by the Corps assessing the cost to restore the subject property and use of the property known as Black Lake Complex. However, with the passage of time, that estimation becomes less and less realistic as an adequate amount to address the taking suffered by petitioner.

In March of 2004, respondent filed a motion for judgment on the pleadings on several grounds, only one of which the Court of Federal Claims held was grounds for dismissal: suit was time-barred under 28 U.S.C.A. § 2501. Petitioner appealed to the Federal Circuit Court of Appeal, which held that the taking did not occur as

soon as Pool 3 was elevated to 95 MSL, therefore, the gradual process instigated by respondent's activity resulted in a permanent taking less than six years before commencement of petitioner's case.

On remand, the lower court subsequently granted the government's motion on grounds of navigational servitude. The Preserve Commission appealed because based on the facts in evidence and applicable law, it defies legal precedence for the lower court to have found that the federal navigational servitude extends from Red River to Black Lake Complex, where the gradual taking occurred that forms the basis of the inverse condemnation, or taking, of property rights to use, enjoy, and maintain the fish and game preserve. The lower court was affirmed by the court of appeal. Hence, the Preserve Commission applies to this Court for a writ of certiorari for redress.

REASONS FOR GRANTING THE PETITION

Erosion occurring above the ordinary high water mark of the Red River would have resulted in a compensable taking of property under the Fifth Amendment, regardless of the navigational servitude. *Owen v. U.S.*, 851 F.2d 1404 (C.A.Fed.,1988), *Banks v. U.S.*, 2003 WL 18410 (C.A.Fed. 2003). Therefore, it seems axiomatic that the subject taking of the Black Lake Complex and the condemnation of most if not all of the use of the fish preserve, as a result of the raising of Pool 3, would also be compensable. The interest at issue relates to the property itself, which is slowly being taken as a result of an authorized government act.

The taking did not occur below the ordinary high water mark of the Red River. The damage suffered in the Black Lake Complex by the Preserve Commission is tantamount to the damage suffered in *Owen v. U.S.*, 851 F.2d 1404 (C.A.Fed.,1988), *Boling v. U.S.*, 220 F.3d 1365 (C.A.Fed. 2000), *Banks v. U.S.*, 2003 WL 18410 (C.A.Fed. 2003), *United States v. Kansas City Life Ins. Co.* 339 U.S. 799 (1950), and *Kaiser Aetna v. U. S.*, 444 U.S. 164 (1979).

If a governmental project imposes permanent consequences on private property that are the direct, natural, or probable result of an authorized activity and are inevitably recurrent, then a Fifth Amendment taking has occurred. *Tri-State Materials Corp. v. U.S.*, 550 F.2d 1 (Cl.Ct. 1977), *Boling v. U.S.*, 220 F.3d 1365 (C.A.Fed. 2000).

Petitioner has and does now contend that the continuing process of physical events by which respondent permitted the taking of petitioner's lawful property interest in the fish and game preserve was grounds for allowing petitioner to file suit once the nature and extent of the taking and its effect became clear and stabilized. The Preserve Commission claim involves the taking of the property comprising Black Lake Complex, which is above the ordinary high water mark of the Red River. The evidence supports the Preserve Commission's claim, regardless of the government's attempt to redefine the real issue (i.e. a gradual taking of the lakes and preserve) into something that, conveniently, has no property right attached to it.

In the case at bar the taking claim is for loss of use and enjoyment of the lakes, property rights that were granted to the Preserve Commission under Louisiana state law. Petitioner's loss, which is a loss of property rights much like the right to exclude others in *Kaiser Aetna v. U. S.*, 444 U.S. 164 (1979), is traceable to the government's project to elevate Red River to an artificial level. These facts constitute a taking by a gradual physical process for which compensation should be provided in order for the Preserve Commission to restore the fish and game preserve and prevent the complete condemnation of the lake complex in the future. These facts do not, however, indicate a taking of property below the ordinary high water mark of the river such that the navigational servitude would preclude a claim for compensation.

Furthermore, even if the navigational servitude did apply to the facts in this case, there is no material basis for the disparate treatment of navigation as opposed to other public uses which trigger the Takings Clause of the Fifth Amendment and require compensation.

I. REVIEW IS WARRANTED TO ADDRESS THE MISAPPLICATION OF THE NAVIGATIONAL SERVITUDE TO THE FACTS OF THIS CASE

A. *The Navigational Servitude Does not Extend to the Northwest Louisiana Fish and Game Preserve*

Invocation of the federal navigational servitude cannot be a pretext to avoid an otherwise compensable taking. *Palm Beach Isles Assoc. v. U.S.*, 2003 WL 22937326 Fed.Cl.,2003. The navigational servitude does not create a blanket exception to the Takings Clause of the Fifth Amendment. *Kaiser Aetna v. U. S.*, 444 U.S. 164 (1979), *Alameda Gateway, Ltd. v. U.S.*, 45 Fed.Cl. 757 (Fed.Cl.,1999). Unlike the power to regulate navigable waters under the commerce clause, the navigational servitude is not coextensive with Congress' regulatory authority. *Boone v. U.S.*, 944 F.2d 1489 (C.A.9.Haw.,1991).

Furthermore, the servitude only encompasses the exercise of federal power with respect to the stream itself and lands beneath its ordinary high-water mark. *U.S. v. Virginia Elec. & Power Co.*, 81 S.Ct. 784 (U.S.Va.,1961), emphasis provided. However, the government must compensate for any taking of property above the ordinary high water mark. In other words,

> "Those owning land within the bed of a navigable stream are subject to the navigational servitude and may not claim compensation when the Government takes the land in aiding the navigability of the

> stream, while those beyond the ordinary high water mark are not subject to navigational servitude and may recover."

Tri-State Materials Corp. v. U.S., 550 F.2d 1 (Cl.Ct. 1977).

The specific basis for the Preserve Commission's claim in the case at bar is that the Corps inversely condemned petitioner's lake and surrounding land when it undertook improvements of the Red River in order to facilitate commercial use of the river, and failed to pay just compensation for the taking. The Preserve Commission's property is distinctly separate from Red River; in between the lake complex and the river are a tributary and a state dam since 1931.

As the Federal Circuit Court of Appeal has explained, "there must be horizontal limits to the extent of a riverbed, or else imposition of the navigational servitude up to the ordinary high-water mark theoretically could extend indefinitely." *Owen v. U.S.*, 851 F.2d at 1410 (1990). "The navigational servitude only relieves the government of the obligation to pay compensation for acts interfering with the ownership of riparian, littoral, or submerged lands which, if not for the fact that a waterway is involved, would require compensation under the fifth amendment." *Boone v. U.S.*, 944 F.2d 1489, 1494 (C.A.9,1991).

Because the taking of the land and property interest in question in the case at bar is outside and/or above the ordinary high water mark of the Red, it is outside

the scope of the navigational servitude, which the Corps should not be able to rely on as a defense to petitioner's claim.

In *Owen v. U.S.*, 851 F.2d 1404 (C.A.Fed.,1988), the Federal Circuit Court held that

> "[i]n appropriate circumstances, compensation can be owed for consequential effects of construction activities to further navigation, undertaken solely within the boundaries of a river bed subject to the Government's navigational servitude; it is not the location of the cause of the damage that is relevant, but the location and permanence of the effect of the government action causing the damage that is the proper focus of the taking analysis."

Emphasis provided.

In that case, the Corps of Engineers argued that it was within its authority as owner of the dominant navigational servitude to intentionally redirect the course of the Tombigbee River to undercut an adjoining landowner's property, resulting in the landowner's farm collapsing into the river due to lack of lateral support. The court of appeals held that the navigational servitude did not extend to existing fast lands. *Owen* at 1043. Because the property alleged as lost due to government-caused erosion was outside the bed of the river, it was unaffected by the navigational servitude.

Therefore, it is well established that even if the navigational improvements were within the proper boundaries, a taking occurs when the damaged property is located outside the water's ordinary high-water mark, and thus renders the government liable for the payment of just compensation. *Kingsport Horizontal Property Regime v. U.S.*, 46 Fed.Cl. (Fed.Cl.,2000).

This was the rationale of *United States v. Kansas City Life Ins. Co.* 339 U.S. 799 (1950), where the U.S. Supreme Court held that when a navigable stream was raised by the government to its ordinary high-water mark and maintained continuously at that level in the interest of navigation, the government was liable "for the effects of that change [in the water level] upon private property *beyond the bed of the stream.*" 339 U.S., at 800, 801.

The Court in *Kansas City Life* allowed recovery for damages to land located on a non-navigable tributary of the Mississippi River resulting from the artificial maintenance of the Mississippi at its high-water level. The land was located one and one-half miles from the river on the tributary. The raised water level in the river also raised the local water table which blocked the drainage of the affected parcel's surface waters, thereby causing the destruction of the land's agricultural value. Since the land, not in the bed of a navigable stream, was not burdened with the navigational servitude, the Court held that a taking had occurred. *Id.* at 802-03.

Kansas City Life thus provides a clear application of the Supreme Court's view of the horizontal and vertical limits on the scope of a stream bed, and of the

corresponding scope of the navigational servitude. It is also particularly applicable to the case at bar because the government here did not establish, nor did the lower court find that the tributary from Black Lake Complex was navigable in FACT, as required by law. *U.S. v. Cress*, 243 U.S. 316 (U.S. 1917).

> "To qualify as a navigable waterway of the United States subject to federal jurisdiction under the Commerce Clause, the waterway must form, either by itself or by united with other waters, a continued highway over which commerce may be carried on with other states or foreign countries in the customary modes in which commerce is conducted by water."

Lykes Bros., Inc., v. U.S. Army Corps of Engineers, 821 F.Supp. 1457, 1464 (M.D.Fla. 1993). The navigational servitude does not cover non-navigable tributaries. *United States v. Cress*, 243 U.S. 316, 326-27, 37 S.Ct. 380, 384, 61 L.Ed. 746 (1917), *Goose Creek Hunting Club, Inc. v. United States*, 518 F.2d 579, 582, 207 Ct.Cl. 323 (1975).

Trade or commerce is not conducted on Sabine Bayou, the tributary in question, at one end of which the Allen Dam was built shortly after the fish and game preserve was lawfully established by the State in 1926. However, even if the tributary was navigable, the navigational servitude would not then extend past the spillway into the Black Lake Complex and preserve lands.

In *Goose Creek Hunting Club, Inc. v. United States*, 518 F.2d 579, 582, 207 Ct.Cl. 323 (1975), the landowner owned property adjacent to a stream, which flowed into a navigable river, which, in turn, flowed into another navigable river on which the government had constructed a dam. Prior to construction of the dam, the property adjoining the stream, or creek, was used by the landowner for hunting and grazing cattle. In addition, the trees growing along the banks of the creek had commercial value. After completion of the dam, however, the property bordering the creek flooded. In determining that the landowner was entitled to compensation for the permanent flowage easement, the court held that the property adjoining Goose Creek was not subject to the government's navigational servitude covering the beds of the two navigable rivers into which it flowed, because such property was situated beyond the beds of those rivers. *Goose Creek*, 518 F.2d at 583. Alternatively, the court held that "even if Goose Creek were considered to be a navigable stream, the landowner nonetheless would be entitled to compensation, since the strips of land adjacent to the creek were above the ordinary high-water mark of Goose Creek under any of the definitions stated above." *Id.* at 584.

In the case at bar, Black Lake Complex is subject to the navigation or navigational project of the Red River, and the lake and contiguous land in the Preserve Commission's possession are above the ordinary high water mark of Pool 3. Therefore, the U.S. should be subject to liability for damages caused to the property as a result of the elevation of Pool 3 to 95 MSL.

The two lower courts' reliance on *U.S. v. Willow River Power Co.*, 324 U.S. 499 (U.S. 1945), is misplaced. In that case, suit by the Willow River Power Company was brought against the United States to recover compensation for impaired efficiency of the company's hydroelectric plant caused by the raising the water level of the St. Croix River. The issue in that case was whether a taking had occurred, which the court concluded in the negative: "Our question is whether the damage is the result of a 'taking' of private property, for which just compensation is required by the Fifth Amendment." *Willow Creek* at *500. The plaintiff sought an award solely for the loss of power; there was no allegation or finding that any other injury was done to property or that the claimant otherwise was deprived of any use of its property, or the impairment of the value of land. *Id.* at 501. Under these circumstances, the court in *Willow River* determine that the plaintiff's allegation did not rise to a taking because it involved an "economic interest" that did not constitute a property right: "not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion." *Id.* at 502.

The *Willow Creek* Court further stated,

> "We cannot . . . call such a claim as we have here a 'property right'; whether it is a property right is really the question to be answered. Such economic uses are rights only when they are legally protected interests.

> Whether they are such interests may depend on the claimant's rights in the land to which he claims the water rights to be appurtenant or incidental; on the navigable or non-navigable nature of the waters from which he advantages; on the substance of the enjoyment thereof for which he claims legal protection; on the legal relations of the adversary claimed to be under a duty to observe or compensate his interests; and on whether the conflict is with another private riparian interest or with a public interest in navigation. The claimant's assertion that its interest in a power head amounts to a 'property right' is made under circumstances not present in any case before considered by this Court."

Id. at 503.

In the case at bar, the taking claim is based on injury to the use of the lakes and preserve, for which the Preserve Commission seeks compensation. The question is the impairment of and physical damage to the property itself, not an economic advantage disconnected to any property right. The Preserve Commission does not have nor has alleged any economic value for use of the Red, as in *Willow Creek*. Petitioner has always sought compensation for loss of use and enjoyment, and other property rights associated with possession of the lakes and, necessarily, the purpose for which the fish and game preserve was established so long ago.

The case at bar is more analogous to *Kaiser Aetna v. U. S.*, 444 U.S. 164 (U.S.,1979), in which the owner of what was once a private pond, separated from concededly navigable water by a barrier beach and used for aquatic agriculture, invested substantial amounts of money in making improvements. The government contended that as a result of the pond's connection to the navigable water, the private property became subject to the federal navigational servitude. The United States Supreme Court did not agree. The Court, distinguishing *Willow Creek*, stated

> "We think, however, that when the Government makes the naked assertion it does here, that assertion collides with not merely an 'economic advantage' but an 'economic advantage' that has the law back of it to such an extent that courts may 'compel others to forbear from interfering with [it] or to compensate for [its] invasion.'"

Kaiser Aetna at 178.

Accordingly, if a plaintiff's interest involves a legally enforceable right, that interest will be considered "property" within the context of the takings clause of the Fifth Amendment. *State of Illinois v. U.S.*, 15 Cl.Ct. 399, (1988). Stated slightly differently, property within the Fifth Amendment denotes the group of rights inhering in a party's relation to the physical thing, as the right to possess and use it. *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 89 L.Ed. 311 (1945).

The Preserve Commission's property and legally enforceable interests vest in petitioner the right to bring a taking claim against the government in order to compel compensation for the interference with said interests. Therefore, in the context of the case at bar, although the Preserve Commission does not have title to the property at issue, petitioner does have property interests protected by the takings clause of the Fifth Amendment. In fact, there is no right or interest with regard to the lakes and land comprising the fish and game preserve that the Preserve Commission does not have under Louisiana law because it has the legal duty of the Preserve Commission to protect the rights inherent in possession of the preserve.

It is the taking of many of those property rights that the Preserve Commission is undertaking its obligation to seek compensation from the government. The taking of the property rights at issue occurred above the ordinary high water mark of the Red River. Therefore, the Federal Claims Court and the Federal Circuit Court rulings that the navigational servitude precludes the Preserve Commission's claim are not supported by the evidence in the record or the relevant law.

II. REVIEW IS WARRANTED TO RESOLVE THE CONFLICT IN TREATMENT BETWEEN NAVIGATION AND OTHER PUBLIC USES, THE TAKING OF WHICH ARE COMPENSABLE UNDER THE UNITED STATES CONSTITUTION

In an additional view, Federal Circuit Judge Randall R. Rader raises an important question regarding a conflict between the federal courts' treatment of certain public purposes which trigger the Fifth Amendment Takings Clause. The result of the conflict is that takings for public use generally require just compensation, while one purpose, i.e. navigation, does not entitle claimants to compensation as a result of a historic privilege that constitutes a dominant servitude.

While the implications of this question are broad and appear to reach as far back as the birth of this nation as we know it, the factual and legal issues in the case at bar are also implicated by the resulting conflict in the way the Constitution has been applied to seemingly analogous takings cases.

The content of the additional view reads as follows:

> RADER, Circuit Judge, additional view.
>
> While I endorse the reasoning and results of the panel, I write separately to highlight a distressing ambiguity in this court's binding precedent. Neither this court nor the Supreme Court has proffered any material basis justifying a different treatment of navigation versus other Fifth Amendment

> public purposes. Why should navigation be received any differently than highway transportation, public safety, or environmental protection? In light of the special protections afforded to navigation, it seems only prudent that such a material basis be provided. (Appendix A, 15a.)

Under the Fifth Amendment of the United States Constitution, "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S.C.A. Const.Amend. 5.

Courts have interpreted the Fifth Amendment to mean that where a government requires land owners to suffer permanent invasion of their property, however minor, the government must provide just compensation. *Lingle v. Chevron U.S.A. Inc.*, 125 S.Ct. 2074, 544 U.S. 528, 161 L.Ed.2d 876 (2005).

The constitutional requirement of just compensation upon the taking of private property for public use derives as much content from basic equitable principles of fairness as it does from technical concepts of property law. *U. S. v. Fuller*, 93 S.Ct. 801, 409 U.S. 488, 35 L.Ed.2d 16 (1973). In other words, it is a question of due process of law. *Village of Norwood v. Baker*, 19 S.Ct. 187, 172 U.S. 269, 43 L.Ed. 443 (1898).

The Takings Clause does not allow an owner to prohibit the government from taking private property altogether; rather, the language of the clause prohibits the government from forcing some people alone to bear

public burdens which, in all fairness and justice, should be borne by the public as a whole. *Maritrans Inc. v. U.S.*, 342 F.3d 1344 (C.A.Fed.2003). Therefore, when a public need arises that requires the acquisition of property, individuals may be required to relinquish ownership of property so long as they are given that just compensation which this clause requires. *U.S. ex rel. Tenn. Valley Authority v. Welch*, 66 S.Ct. 715, 327 U.S. 546, 90 L.Ed. 843 (1946).

For example, the government may not take or impose an easement without just compensation under the Takings Clause. *Ridge Line, Inc. v. U.S.*, 346 F.3d 1346 (C.A.Fed.,2003). Nor may the government condemn easements under the Fifth Amendment without compensation. *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114 (C.A.10,2002).

That being said, there is one exception to this general rule that the federal government plays like a wild card whenever navigation is involved. So the issue at hand is this: why does a jurisprudential privilege with no material basis trump a due process right guaranteed by the Fifth Amendment of the U.S. Constitution?

In *U.S. v. 30.54 Acres of Land, More or Less, Situated in Greene County, Com. of Pa.*, 90 F.3d 790 (C.A.3,1996), the court explained that although the Fifth Amendment requires payment of just compensation for private property taken for public use, the government is not required to pay for economic losses resulting from the exercise of its "navigational servitude," which is its power to regulate the use of navigable waterways, because navigable waterways have always been under

the exclusive control of the federal government under the Commerce Clause.

Therefore, the courts have held that the basis of the federal government's "dominant servitude" over the navigable waters of the United States arises from the Commerce Clause of the United States Constitution. *Parm v. Shumate*, 513 F.3d 135 (C.A.5.La.,2007), *Banks v. U.S.*, 71 Fed.Cl. 501 (Fed.Cl.,2006).

The Commerce Clause of the United States Constitution broadly refers to the regulation of commerce, and provides that Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S.C.A. Const. Art. I § 8, cl. 3.

The channels of interstate commerce which Congress may regulate under its commerce clause power are the routes through which commerce travels, and the term refers to navigable rivers, lakes, and canals, the interstate railroad track system, the interstate highway system, interstate telephone and telegraph line, air traffic routes, television and radio broadcast frequencies, and satellite communication frequencies on, over, and through which flow the goods, commodities, and information which constitute commerce between places in different states. *U.S. v. Shahani-Jahromi*, 286 F.Supp.2d 723 (E.D.Va.,2003), *U.S. v. Ballinger*, 395 F.3d 1218 (C.A.11.Ga.,2005).

On the surface, it does sound logical that a navigational servitude is the right of the public to use navigable waterways as continuous highways for the

purpose of navigation in interstate commerce as in cases like *Dardar v. Lafourche Realty Co., Inc.*, 985 F.2d 824 (C.A.5,1993). However, to make such a statement raises the question of why other means of interstate commerce within the regulatory power of Congress are not also granted special protection, privilege, or dominance.

Highways, for example are within the power of Congress to regulate under the Commerce Clause. Additionally, highway transportation is also a public use covered by the Fifth Amendment. Yet the acquisition of private property for the improvement of a highway by the government is a Fifth Amendment taking that requires just compensation in order to comply with due process of law. *Federal Real Estate & Storage Co. v. U.S.*, 79 Ct.Cl. 667 (Ct.Cl.,1933), *Fruin-Colnon Corp. v. Vogt*, 500 F.Supp. 606 (S.D.Ill.,1980).

In *Farmland Preservation Ass'n v. Goldschmidt*, 611 F.2d 233 (C.A.8,1979), a federal interstate highway project through a rural area between Cedar Rapids and Waterloo bisected farm lands adapted to various agricultural uses. As a result, the contemplated highway would force the affected farmers into unfavorable diagonal operations. The court held that "[t]he landowners are entitled, of course, to just compensation for their lands that are taken in connection with the project" pursuant to the Fifth Amendment. *Goldschmidt* at 237. "And where, as here, partial takings are involved, the landowner is entitled to be compensated not only for the value of his land that is actually taken, but also for the diminution of the value of what is left to him after the taking." *Id. See also, U.S. v. Gossler*, 60 F.Supp. 971 (D.C.Or.1945), where the

government condemned a parcel of land servient to a right of way connecting a gravel bar with a highway, the owner of the right to take gravel from bar had a compensable property interest in the right of way other than the value of the way itself, and the government was not free from liability to such owner for the taking of their interest in the way.

In *U.S. v. Certain Parcels of Land in Kent County, Mich.*, 252 F.Supp. 319 (D.C.Mich. 1966), a condemnation proceeding in connection with the construction, reconstruction, and improvement of the Michigan Highway Project I-96-1(10)66, the court denied the government's motion for summary judgment. The court held that the issue as to whether the interference with the owner's property, a portion of which was condemned in connection with construction, reconstruction and improvement of a highway project, was so substantial as to be a taking, and thus compensable under the Fifth Amendment precluded summary judgment. "What is at issue here is a claim that the interference with defendant's property is so great as to render that property ineffective and useless (in effect, destroyed) for [its] purposes[.]" *Certain Parcels of Land in Kent County, Mich.* at 324, also citing *United States v. General Motors Corp.*, 323 U.S. 373, 65 S.Ct. 357, 89 L.Ed. 311 (1945)

> "The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has

> been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking."

Even a municipality, a county, a state or another public entity having responsibility for the property taken has sufficient property interest to maintain action and is entitled to compensation for the taking. *State of Wash. v. U.S.*, 214 F.2d 33 (C.A.9, 1954), *Sarpy County, Neb. v. U. S.*, 386 F.2d 453, 181 Ct.Cl. 666 (Ct.Cl.1967).

Therefore, an unacceptable conflict has arisen between the way the courts handle land owners' rights in the cases discussed above involving highways as a public use, and the way plaintiffs such as the Preserve Commission are treated. Review is warranted to resolve this conflict, since the navigational servitude is a jurisprudentially created privilege, while just compensation is a constitutional right to due process of law.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests the Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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